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SUPREME COURT, U.S.
FILED
MAR 24 1992
OFFICE OF THE CLERK

NO. 91-1278

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

DR. MARK FELDMAN, PRO SE

PETITIONER

VS.

STEPHEN GLUCROFT, M.D., ET AL.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

PETITIONER'S REPLY BRIEF ASSERTS THAT THIS COURT HAS JURISDICTION IN THIS CASE, AND THAT THE QUESTION PRESENTED IN HIS PETITION FOR THE WRIT IS CORRECT.

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SUMMARY OF THE ARGUMENT

Respondent's assert in their brief at page 2 "this court lacks jurisdiction to grant a writ of certiorari because the state court did not CONSIDER (emphasis mine) or rule upon any federal law questions." No federal claim was PRESERVED or CONSIDERED (emphasis mine) below, Petitioner has no basis for seeking certiorari in this case."

Petitioner asserts that such is not the case.

ARGUMENT

PETITIONER PRESERVED THE UNITED STATES AND FLORIDA CONSTITUTIONAL DEPRIVATION ISSUES FOR REVIEW

THE STATE COURT DID CONSIDER OR RULE UPON FEDERAL LAW QUESTIONS. THE FEDERAL CLAIMS WERE PRESERVED AND CONSIDERED BELOW.

In Petitioner's initial brief to the Third District Court of Appeal of Florida and filed 8/10/85, reproduced as appendix A, the United States Constitutional issues were raised.

In Petitioner's reply brief to the Third District Court of Appeal filed 11/18/85 the United States Constitutional issues were cited again. Reproduced as appendix B.

From these briefs, the Third District Court of Appeal certified the questions to the Supreme Court of Florida. The United States Constitutional issues were carried to the Supreme Court of Florida in his brief filed 8/12/86. Reproduced as appendix C.

APPENDIX D 3DCA 2/26/91

THIS COURT HAS JURISDICTION

As Mr. Justice Powell and Mr. Justice Brennan said in their concurring opinion Webb v. Webb, 451 U.S. 493 (1981), at 502:

> "...the Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness. Wood v. Georgia, 450 U.S. 261, 265, n. 5 (1981). See also, Vachon v. New Hampshire, 414 U.S. 478 (1974) (finding plain error in an appeal from a state court)."

And as Mr. Justice Marshall said in his dissent, Webb, supra, at 502, "I share the Court's concerns for comity and for careful pleadings. Nonetheless, I do not believe that either of these concerns justifies the Court's apparent conclusion that a petitioner who fails to cite the exact location of a federal constitutional provision has neglected to raise a claim on that ground." In Wood v. Georgia, 450 U.S.

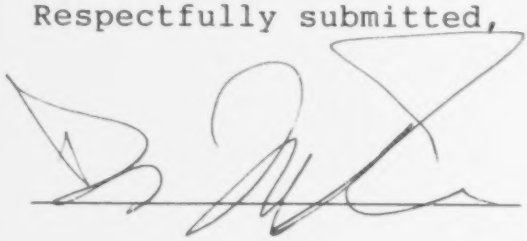
450 U.S. 261 (1981), this court at 264, "Where, as here a possible due process violation is apparent on the particular facts of a case, we are empowered to consider the due process issue."

At note 5, "Even if one considers that the conflict-of-interest question was not technically raised below, (emphasis supplied) there is ample support for remand required in the interest of justice. See 28 U.S.C. 2106 (authorizing this Court to "require such further proceedings to be had as may be just under the circumstances"); R. Stern & E. Gressman, Supreme Court Practice 6.27, p. 460 (5th ed. 1978) (in review of state cases, "the Court doubtless limits its power to notice plain error to those situations where it feels the error is so serious as to constitute a fundamental unfairness in the proceedings") (emphasis supplied) See also Vachon v. New Hampshire, 414 U.S. 478 (1974).

CONCLUSION

It is clear that Petitioner asserted his claims under the United States and Florida Constituitions in his complaint upon remand from the Florida Supreme Court. Further, that he preserved such claims from his first visit to both the Third District Court of Appeals and the Florida Supreme Court from which this appeal flows after remand and the filing of the Amended Complaint. This Court has jurisdiction if this Court follows the law asserted in this brief. For these reasons, the writ of certiorari should be granted.

Respectfully submitted,



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of March 1992 to:

Robert Butterworth, Esq,, Attorney General, State of Florida, Tallahassee, Fla., and

Dan Paul, Esq. Counsel of Record,
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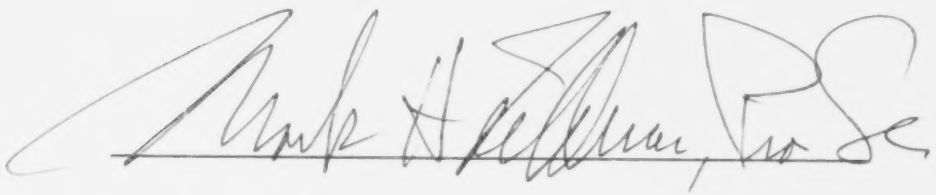

A P P E N D I X A

IN THE THIRD DISTRICT COURT OF APPEAL

CASE NO. 85-1262

FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 84-8615

MARK H. FELDMAN, PRO SE

APPLELLANT

VS

STEPHEN GLUCROFT, M.D. et al.

APPELLEES

INITIAL BRIEF OF APPELLANT

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From Page 1 and 2

Dr. Feldman alleged that in secret the defendants conspired to and were effective in having his privileges removed to perform this procedure and in the process libeled, slandered, defamed, and denied him his Rights under the United States and Florida Constitutions.

From Page 4

Dr. Mark Feldman, (hereinafter, Feldman) filed his three count Complaint alleging torts of libel, slander and defamation and United States and Florida Constitutional deprivations in March of 1984.(R.1). Defendants answered (R.29) with defenses. Discovery ensued, limited by the Court, with subsequent motions by both sides for Summary Judgment (defendant's R. 40 & 168, by plaintiff R.256). Final Judgment entered on all counts for defendants (R.259) from which plaintiff-appellant appeals (R.257).

Appellant argues that Fla. Stat.768.40(4) is unconstitutional because it violates provisions in the United States and Florida Constitutions. Appellant's position is supported by rulings of the United States and Florida Supreme Courts which have interpeted the constitutional provisions in question to the extent that the statue must fall. The statute fails to pass muster as it removes the constitutionally guaranteed right of access to the courts and grants immunity to medical review committees that in effect is absolute.

"The privilege against discovery is greater than that afforded the press by the first amendment to the United States Constitution, Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115(1979), Holly, supra at 222, fn.2.

"An impartial decision maker is the basic constituent of minimum due process." Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970.

Granting absolute immunity to committee members for tortious conduct would confer upon them the immunity status of the President of the United States and that of Judges. The first amendment does not reach so far. McDonald v. Smith, 105 S.Ct. 2787 (1985). In addition, the Supreme Court has decided that on matters which are not of public concern, recovery of presumed and punitive damages is permitted absent a showing of "actual malice." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985).

> ..."the individuals right to the protection of his own good name..." Builders, supra, at 2945

cannot be abrogated in favor of appellees such as these who did such as appellants allegations in his complaint.

It is an "elementary principle that the same statue may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." Allen v. Louisiana, 103 U.S. 80,83-84, 13 otto 80, 26 L.Ed. 318 (1881), quoted with approval in Field v. Clark, 143 U.S. 649, 695-696, 12 S.Ct. 495, 505-506, 36 L.Ed. 294 (1892).

The subsequent statutes to 395.0356 now mandate reporting to the state infractions relating to patient care when discovered in the review committee process.

This isaction by the state which through multiple choices may discipline or remove a doctors license. Holding the committee records from plaintiffs thus becomes preclusion by the state from obtaining the very proof to clear one's name by activities which might otherwise be private. The Medical Malpractice Reform Act of 1975, et seq mandated reporting to the state. See generally, PRIVATE CONSPIRACIES TO VIOLATE CIVIL RIGHTS, Harvard Law Review, Vol. 90:1721 1977. Staff members who serve on review committees are thus quasi-judicial officers acting for the state to whom its agencies must be reported to by statute.

When, as here alleged, these officers willfully violate the rights of another hospital staff member, they must be called to the Bar of Justice to account for their acts. In this case, Parkway bylaws provided for the hearing process. Defendants willfully circumvented that process for their own gain. The hospital performed as it was required to do, but unknown to them and the plaintiff here, defendants in concert sought to and did destroy another staff member at Parkway and all other hospitals the plaintiff applied to by dissemination of false charges. Such conduct cannot be condoned by allowing defendants to escape by prohibition of proof readily available.

APPENDIX B

IN THE THIRD DISTRICT COURT OF APPEAL

CASE NO. 85-1262

FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 84-8615

MARK H. FELDMAN, PRO SE

APPLELLANT

VS

STEPHEN GLUCROFT, M.D. ET AL.

APPELLEES

REPLY BRIEF OF APPELLANT

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"A fair hearing before an unbiased tribunal is essential to due process," Duffield v. Charleston Area Medical Center, 503 F.2d 512, 517 (4Cir. 1974). This Parkway attempted to do until its actions were circumvented by defendants. Even a "private" hospital must follow its bylaws, Margolin v. Morton F. Plant Hospital Assn. 348 So.2d 57 (Fla. 2DCA 1977).

As a matter of law, this court should find that defendants actions were clothed with the mandate of the state and denied Dr. Feldman his rights under the Untied States and Florida Constitutions, if the allegations in his complaint are proved true.

Thus, the privilege statute violates the equal protection guarantees of article 1, section 2 of the Florida Constitution and the Fourteenth Amendment.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

FROM THE THIRD DISTRICT COURT OF APPEAL, OF FLORIDA

CASE NO. 85-1262

DR. MARK H. FELDMAN, PRO SE

PETITIONER,

V. CASE NO. 68,920

3DCA CASE NO. 85-1262

STEPHEN GLUCROFT, M.D. ET AL.

RESPONDENTS.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT
From Page viii

This case deals with fundamental rights of doctor's triggered during the process of applying to, being disciplined by, and reviewed in any capacity by one or more hospital committees. The decision by the Court will change the way medicine is practiced in Florida and perhaps the United States. At issue is whether the law as written and applied can withstand constitutional scrutiny as it eliminates, through freezing the discoverability and use in judicial proceedings, all evidence in the hospital committee review process.

The fundamental rights implicated are access to the courts, First Amendment guarantees, and due process and equal protection guarantees under the 14th Amendment of the U.S. Constitution and Article I sections 4, 5 and 21.

As applied the offending statutes grant absolute immunity to all participants in the medical review committee proceedings. The victim is without power to clear his name, and to add insult to injury, plaintiffs must post bond or pay all defendants attorney's fees prior to being heard by a Court. The cause of action for defamation against a doctor is now eliminated by legislative fiat and this Court in it's Holly decision.

The courts of this State and those of the United States have long held that the legislatures and the Congress are without power to eliminate such fundamental rights as are implicated here, without providing an alternative or passing strict judicial scrutiny in explaining the reasons for such elimination.

The case before the Court cannot pass muster for upholding the statutes, eliminating a doctor's cause of action for defamation, and granting absolute immunity to all participants in the defamatory process.

Upholding these constitutional infirmities would precipitate multiple injuries to thousands of health care professionals around the United States.

Hospital privileges would be granted to a select few who "knew the right people," and would eliminate dissent in the health care industry. The Constitutional guarantees of this country cannot be for sale for each group capable of lobbying the legislatures for absolute immunity. The statutes, it is respectfully submitted, must fall.

While giving credence to legislative intent, it cannot be asserted that their power is to eliminate judicial review. Marbury v. Madison, 1 Cranch 137, 163, 5 U.S. 137, 163, 2 L.Ed. 60 (1803). As Chief Justice Marshall insisted,

> "(t)he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."

And 32 years later the Chief Justice reinforced the concept in United States v. Nourse, 9 Pet. 8, 28-29, 34 U.S. 8, 28-29, 9 L.Ed. 31 (1835),:

> "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process...leaving to the debtor no remedy, no appeal to the laws

> of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States."

Defendants controlled the orthopedic staffs at other hospitals as well; North Shore and Biscayne, where petitioner would have applied after success at North Miami. Defendants had opposed petitioner at Parkway and lost because of petitioners credentials. Unknown to petitioner, defendants had petitioners privileges reduced at Parkway through the "experimental procedure lie" as alleged in the complaint, and then used the same lie in meetings at North Miami General, where petitioner was applying, all unknown to petitioner. Contrary to Fla. Law, petitioner was not told why his application was rejected at North Miami General.

If these allegations are true, Dr. Feldman was the victim of multiple defamatory acts by defendants circulated to hundreds of persons over several years. The forum for presentation of the truth is a Court of Law, not intra hospital hearings which permit the abolition of a doctors career without recourse. We deal here with

Fundamental Rights, Fla. Const. Art. I, sec. 4, 21, U.S. Const., Amend. 14, Due Process, Equal Protection.

This case involves "judicial enforcement of a discriminating legislative enactment, and therefore state action is implicated. Sasso v. Ram Property Management, 431 So.2d 204 (1DCA 1983), at 211, n. (8).

The statute must be analyzed under the "strict scrutiny"standard because a fundamentalright is involved. Examining Board v. Flores De Otero, 426 U.S. 572, 96 S.Ct. 2264, 49 L.ed.2d 65 (1976). First amendment rights are included, Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), as is the right of access to the courts, e.g. NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963). Such rights include those "implicit or explicit" in the Constitution. San Antonio Independent School District v. Rodriguez, 411 U.S. 1,33-34, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973).

The Statutes as applied allow for the arbitrary and capricious treatment of doctors who apply to hospitals for privileges.

Some are given procedural and substantive due process and some, as petitioner here, are not. The Conflicting statutory provisions and the Holly decision of this court prevent any evidence sufficient for the accused to defend and clear his name. A fair hearing before an unbiased tribunal is essential to due process. Duffield v. Charleston Area Medical Center, 503 F.2d 512, 517, (4th Cir.1974).

"An impartial decision maker is the basic constituent of minimum due process." Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). As the Drucker testimony shows, (R.241-256), the treatment afforded Dr. Feldman was far different from that he would have received had he been an Orthopedist.

Further, this disparate treatment failed to conform to the essential requirements of law. Cardia, supra.3 at 805, through the statutory acceptance of the Rules and Regulations of the Joint Commission on Hospital Accrediation. Defendants actions violated the statute as a matter of law, Cardia, supra, at 806, n. 4, Fla. Adm. Code Rule 10D-28.58(2) (d). (See also n.5 and 6, p.806).

This aberrant procedure which provides a review mechanism where orthopedists are evaluated by orthopedists, as well as other specialists evaluating members of the same specialty, but only in the case of podiatrists not allowing podiatrists to evaluate podiatrists denies both due process and equal protection to petitioner.

Dr. Feldman's liberty and property interest were removed from him contravening the dictates in Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

The effect of Holly, is to grant absolute immunity to the review committees. Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985), do not permit such a result.

> "Spreading false information in and of itself carries no first Amendment credentials." 441 U.S. at 171, "It is worth nothing here that the privilege as asserted by respondents would also immunize from inquiry the internal communications occurring during the editorial process and thus place beyond reach what the defendants participants learned or knew as the result of such collegiate conversations or exchanges.

If damaging admissions to colleagues are to be barred from evidence, would a reporter's admissions made to third parties not participating in the editorial process also be immune from inquiry?", Id.

> "Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstance. The President, for example, does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. United States v. Nixon, 418 U.S. 683 (1974). In so holding, we found that although the President has a powerful interest in confidentiality of communications between himself and his advisers, that interest must yield to a demonstrated specific need for evidence. As we stated, in referring to existing limited privileges against disclosure, "(w)hatever their origins, these exceptions to the demand for every man's evidence are not created lightly nor expansively construed, for they are in derogation of the search for truth." Nixon at 710.

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name reflects no more than our basic concept for the essential dignity and worth of every human being a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the States...", Dun supra, at 2947 quoting Rosenblatt v. Baer, 383 U.S. 75. 92.

The legislature of Florida is without power to eliminate a cause of action which abrogates petitioner's fundamental rights in this case. Kluger, supra., Holly, supra, dissent of Judge Shaw and Judge Adkins, 221-223.

Hospital officials and all review committees now must be considered "state actors" because their activities are guided by and must be reported to the State.

The state has erected an impenetrable barrier around the "state committees" triggering the protection of Paul v. Davis, 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155. As the Cardia court has noted, at 806, this is impermissible. The statutes are facially unconstitutional.

ADDENDUM TO REPLY BRIEF, ERROR CAUGHT PRIOR TO SENDING BRIEF BUT TOO LATE TO REPRINT BRIEF PRIOR TO THIS CASE GOING TO CONFERENCE

APPENDIX D: APPELLANTS BRIEF SENT TO THE FLORIDA THIRD DISTRICT COURT OF APPEALS FEB. 26, 1991.

ON PAGE 6: Lake Hospital v. Silversmith, 551 So.2d 538(4DCA 1989) at 544, that a physician can claim a violation of due processagainst a private hospital upon the termination of his staff privileges.

From page 7. : ..Lawler v. Eugene Westhoff Mem. Hosp., 497 So.2d 1261 (Fla. 5DCA 1986) the court stated : one of the purposes behind sec. 395.065 was to REQUIRE BOTH PUBLIC AND PRIVATE hospitals to handle staff privileges in conformity with FAIRNESS AND DUE PROCESS."

FROM page 20: Upholding these statutes, (the prohibitions against discovery and the bond requirement for plaintiff's only in hospital peer review litigation), offends

Article I section 9, due process, Article I sec. 21, Access to the courts, and the Equal Protection clause of the Florida and United States Constitutions.

FROM PAGE 21: The Supreme Court of the United States in Bodie v. Connecticut, 401 U.S. 371 (1971), made clear that fee requirements affecting fundamental rights will not stand fundamental evaluation.

This holding must extend to fees which if imposed would render an individual indigent. Boddie rejected distinctions between the civil and criminal process in determining the permissibility of restrictions upon access to the courts. Meltzer v. Lecraw, 402 U.S. 954, n2 and at____v.___406 U.S., nl, Justice Douglas concurring, " I share the view of Justice Black, however that " (T)he decision in Boddie v. Connecticut can safely rest on only one crucial foundation -- that the civil courts of the United States and each of the States belong to

the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney..."

Lindsey v. Normet, 405 U.S. 56 (1972) held invalid a state statute requiring the posting of a double bond. There the state reasoned that frivolous appeals would be halted. In striking the law, the court noted " The claim that the double bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars non-frivolous appeals by those who are unable to pay the bond, but also allows meritless appeals by others who can afford the bond." at 78.

FROM PAGE 22: In Martinez v. California, 444 U.S. 227, 281-282 (1980), the Court noted, "a State Court claim is a specis of property protected by the Due Process Clause." THE SUPREME COURT AND LITIGATION ACCESS FEES: THE RIGHT TO PROTECT ONE'S RIGHTS, Duke Law Journal, 73:1153 (part I) and 74: 527 (part II), analyze the Court's cases barring

judicial access fees through fees and bonds.

FROM PAGE 27:

A vested right of action is property and the Legislature may not take it away. 11 AM JUR, Constitutional law, sec. 377. If this court upholds the constitutionality of these statutes, petitioner will have an action under 42 USC 1983 as his profession will be taken away through the mandatory posting of a bond prior to entering the courts. ____v___805 Fed.2d 662 at 662-669.

The government must treat plaintiffs equqlly as access to the courts is a fundamental right. Requiring the posting of a bond by plaintiffs only is disparate treatment by the government and is impermissible. Johnson v, Smith 696 F.2d 1334, (11Cir. 1983).